Petition

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No. A-222

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

RUSSELL E. C. MARTIN, Respondent

v.

JAMES C. STEUBNER, et al., Petitioners

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Question Presented for Review

Is it a denial of due process to extend the legislative reach of the Blue Sky Laws of Ohio to encompass a Minnesota resident who never entered Ohio, had minimal contacts with Ohio and only engaged in a single isolated transaction with an Ohio resident.

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Question Presented for Review

Is it a denial of due process to extend the legislative reach of the Blue Sky Laws of Ohio to encompass a Minnesota resident who never entered Ohio, had minimal contacts with Ohio and only engaged in a single isolated transaction with an Ohio resident.

List of All Parties to the Proceeding

Respondent - Russell E. C. Martin

Petitioners - James C. Steubner; Northland Development Company of Minneapolis, Inc.; Northland Community Arena, A Limited Partnership.

Official and Unofficial Reports of Decisions

The decision and order of the Federal District Court is reported at 485 F.Supp. 88 (S.D. Ohio 1979). The decision of the Sixth Circuit of Appeals has not yet been published.

Jurisdiction

The judgment of the Court of Appeals for the Sixth Circuit was entered on June 25, 1981. The date stamp does not reflect its time of entry. On September 14, 1981, the United States Supreme Court extended the time for petitioners to file their petition for certiorari up to and including October 22, 1981. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Statutory and Constitional Provisions Involved

The Due Process clause of the Fifth and Fourteenth Amendments to the United States Constitution and Ohio Revised Code §1707.43 are involved.

Statement of the Case

James C. Steubner resides in Minneapolis, Minnesota, and in 1974, was president of Northland Development Company of Minneapolis, Inc. This Minnesota corpora-

tion was the general partner of Northland Community Arena, a Minnesota limited partnership which owned and operated an ice skating arena in Minneapolis. In 1974, the partnership wanted to expand the arena by building a second sheet of ice. In order to finance this expansion the partnership attempted to raise some funds by the sale of a few limited partnership interests.

The Midwest Edition of The Wall Street Journal published in Chicago is widely circulated in Minneapolis and is often used as a place to list such investment opportunities. Jim Steubner placed such an advertisement in the Midwest Edition of The Wall Street Journal and received inquiries from various people in Minnesota. In addition, the respondent, Russell E. C. Martin, who resided in Ohio, read the notice and initiated a call to Jim Steubner in Minneapolis. After receiving certain information, Mr. Martin, totally unannounced,

traveled to Minnesota in late September of 1974, and met with Jim, toured the arena, and reviewed certain books and records of the partnership. Thereafter, in late October, 1974, Mr. Martin concluded to and did invest $100,000 and became a limited partner in Northland Community Arena, along with one other new individual from Minnesota who invested $250,000.

In 1975, a freon leak resulted in a contamination of the entire cooling system of the arena. As a result of this, in late 1975, the arena failed and ultimately closed.

In July, 1976, Mr. Martin filed this action in Federal District Court in Ohio alleging violation of federal securities laws, common law fraud, and violation of Ohio Blue Sky Laws. Jurisdiction in federal court was claimed by Mr. Martin pursuant to 15 U.S.C. §§77v and 78aa, diversi-

ty of citizenship and pendent jurisdiction. Petitioners' motion to dismiss for lack of personal jurisdiction in Ohio was overruled because the federal securities law has a nationwide service of process statute. 15 U.S.C. §§77v and 78 aa.

This case was tried to the court and on October 30, 1979, the court filed its extensive findings of fact and conclusions of law. The court found no violation of any federal securities law and no federal or state fraud violation. The court was perplexed as to whether or not to apply the Blue Sky Law of Ohio to petitioners who did not enter Ohio, had minimal contact with Ohio and were involved in only this single isolated transaction with an Ohio resident:

> I have some difficulty in justifying the application of the Ohio Blue Sky Law to the defendants in this case, based on the minimal contacts listed.
>
> [Appendix p. 58.]

The court, however, concluded to apply the Ohio Blue Sky Law to the transaction and held because the petitioners did not register with the Ohio Division of Securities before the sale Mr. Martin was entitled to rescission and return of his $100,000. This decision was appealed to the Sixth Circuit Court of Appeals which affirmed in a brief opinion.

Reason Why The Writ Should Be Granted

IT IS A VIOLATION OF DUE PROCESS TO EXTEND THE LEGISLATIVE REACH OF THE BLUE SKY LAWS OF OHIO TO ENCOMPASS A MINNESOTA RESIDENT WHO NEVER ENTERED OHIO, HAD MINIMAL CONTACTS WITH OHIO, AND ONLY ENGAGED IN ONE ISOLATED TRANSACTION WITH AN OHIO RESIDENT.

A. A Conflict Exists Between The Circuits Regarding Whether Or Not Due Process Is Violated By The Extraterritorial Application Of A State Blue Sky Law To A Resident Of Another State Who Never Enters The First State And Has Only A Single Isolated Transaction With A Resident Of The State.

In Travelers Health Association v. Virginia, 339 U.S. 643 (1950), the Court held that application of a Virginia Blue Sky Law to a Nebraska mail order health insurance business which never entered the state of Virginia, did not offend due process where the "association did not engage in mere isolated or short-lived transactions." The Supreme Court has not yet

decided a "mere isolated sale" case. The circuits which have decided this issue are in conflict.

The First Circuit was one of the first to face the issue and held The Blue Sky Law of New Hampshire did not apply to an isolated sale effected by a salesman in Massachusetts. Doherty v. Bartlett, 81 F.2d 920 (1st Cir. 1936), cert. denied sub. nom. 298 U.S. 676. While this case was decided in 1936, it remains good law in the First Circuit.

In 1967, the Tenth Circuit faced a fact situation almost precisely the same as the instant case. Gaillard v. Field, 381 F.2d 25 (10th Cir. 1967) cert. denied 381 U.S. 1044. In Gaillard the plaintiffs resided in California, the defendant in Oklahoma. The defendant sold to the plaintiffs for $180,000 fractional interests in certain oil and gas leases. Under Cali-

fornia law, the intersts were securities and should have been registered in California pursuant to its Blue Sky law prior to sale to plaintiffs. A failure to register afforded the plaintiffs the right to rescind. The plaintiffs brought their action in Federal District Court in Oklahoma and alleged violations of the federal securities laws, federal and state fraud and also demanded rescission for violation of the California Blue Sky law. The District Court held there was no violation of federal securities laws, no fraud and while acknowledging the sale was not registered in California, refused to award plaintiff rescission. The Tenth Circuit affirmed.

The holding of the Sixth Circuit in the instant case is in direct conflict with the Tenth Circuit, Gaillard v. Field, supra; while the decision of the First Circuit in Doherty v. Bartlett, supra is

not as exhaustive and the facts are not precisely on point as they are in Gaillard, a conflict still exists.

The lack of clear judicial precedent was troubling to the District Court in the instant case:

> The law concerning the applicability of a state Blue Sky Law or (sic) interstate transactions and foreign defendants is far from clear. See Loss & Cowell, Blue Sky Law, 181-229 (1959). The cases which do consider the question defy generalization and tend to raise more questions than they answer.
>
> [Appendix at p. 49.]

When the District Court looked to the legal precedent in Ohio it reviewed a 1935 Attorney General opinion which held:

> It is my opinion that advertisements offering securities by non-resident and non-licensed dealers,

> which securities are not registered under the Ohio Securities Act, are not prohibited by such act when such advertisements are contained in newspapers, magazines or periodicals published outside of the state and offered for sale on newsstands within this state or sent to subscribers by mail. 1935 Ohio A. G. Opinions 1423, 1425-26.

Yet the District Court chose not to follow that opinion. Indeed opinions from other attorney generals further reveal the conflicts that exist because of a lack of clear Supreme Court guidelines. Oregon Attorney General Opinion, March 10, 1939 (a contract which is executed out of state for a sale of ecurities effectuated through the mails is interstate commerce and the Blue Sky laws do not apply).

B. The Extent To Which The Legislature Of One State Can Regulate The Activities Of A Resident Of Another State Are Controlled By Considerations Of Due Process And Fundamental Fairness.

What are the outer limits of the legislative power of one state over residents of another. In the Blue Sky area, the issue is precisely focused in the leading treatise:

> [O]ne question requires special treatment because it presents a number of peculiar problems: Does a person in State X who effects a transaction in State Y solely by use of the mails or some interstate facility, without entering State Y, violate the blue sky law of State Y?
>
> * * *
>
> In any of these procedural situations at least two subquestions are raised: Does the blue sky law of State Y apply purely as a matter of interpretation? And, if it does, is it constitutional? In addition, if a proceeding is brought

> in State Y, there is a further question of jurisdiction (or extradition in a criminal case).
>
> [Loss & Cowell, Blue Sky Law, p. 210-211 (1958).]

Given the broad definition of "sale" which is found in most securities statutes, the statute will almost always be interpreted to apply.[1] In the instant case, there is no question of statutory construction. The proper reading of the statute is it applies. The only question is whether or not extension of the statute is constitutional.

---

[1] See for example Ohio Revised Code §1707.01(C)(1) which defines "sale":

> "Sale" has the full meaning of "sale" as applied by or accepted in courts of law or equity, and includes every disposition, or attempt to dispose, of a security or of an interest in a security. "Sale" also includes a contract to sell, an exchange, an attempt to sell, an option of sale, a solicitation of a sale, a solicitation of an offer to buy, a subscription, or an offer to sell,directly or indirectly, by agent, circular, pamphlet, advertisement, or otherwise.

In the instant case, the District Court properly focused the inquiry on the question of the territorial reach of a state's legislative power and distinguished this from the jursidictional issue:

> This inquiry is distinct from the issues discussed above with regard to the Court's jurisdiction. As an inquiry into the territorial reach of a state's legislative power, it is also different from the question of the territorial reach of a state's judicial power. Like the question of state judicial jurisdiction, however, the scope of state regulatory legislation is limited by due process considerations of fundamental fairness.
>
> [Appendix at p. 50.]

The District Court identified that it was the due process consideration of fundamental fairness which defined the outer limits and distinguished this from the often prevalent question of minimum contacts for

personal jurisdiction. World-wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980).

The Seventh Circuit has also identified that it is substantive due process which defines the limits for the legislature of one state in seeking to control the residents of another state:

> Undoubtedly, substantive due process imposes a floor on the nexus between a person and his practices relative to a state which will be sufficient to support legislation running against him. Cf. Pacific Seafares, Inc. v. Pacific Far East Line, Inc., 131 U.S.App.D.C. 226, 404 F.2d 804, 815 (1968), certiorari denied, 393 U.S. 1093, 89 S.Ct. 872, 21 L.Ed.2d 784. And the connection between a state and the regulated person must be of a more substantial character than the "miminum contacts" needed to support judicial process running against a person. Travelers Health

Assn. v. Virginia, 339 U.S. 643, 652-653, 70 S.Ct. 927, 94 L.Ed. 1154 (Douglas, J., concurring); . . .

[Aldens, Inc. v. LaFollette, 552 F.2d 745, 750-751 (7th Cir. 1977) cert. denied 434 U.S. 880.]

It is this substantive due process and fundamental fairness test that must be applied in defining the outer limits of the Blue Sky Law of a state.

C. In The Present Case It is Fundamentally Unfair To Apply The Blue Sky Law Of Ohio To Petitioners Who Were Engaged In A Single Isolated Transaction With An Ohio Resident But Never Entered Ohio And Never Initiated Telephone Calls Or Mail To The Ohio Resident.

In the instant case it is simply fundamentally unfair to apply the Ohio Blue Sky law to petitioners. Petitioners resided in and never left Minnesota. They had no office in Ohio, initiated no telephone calls to Ohio, did not travel to Ohio and wrote to respondent in Ohio only in direct response to respondent's request for in-

formation. Petitioners had only this single isolated transaction with an Ohio resident. This one contact was their only contact.

The only thing petitioners did was to advertise in the Midwest Edition of The Wall Street Journal, published in Illinois. Yet the Ohio Attorney General clearly stated that this type of advertisement which resulted in a sale in Ohio was not sufficient to subject the out of state resident to the Ohio Blue Sky law. But in this case, there really was nothing else initiated by the petitioners. It was the Ohio resident that initiated the calls to Minnesota; it was the Ohio resident who traveled to Minnesota to examine the arena and obtain information.

The District Court, in reviewing the facts, held:

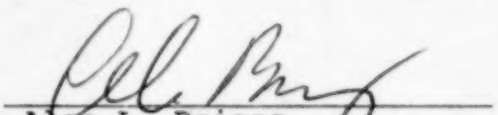
> These contacts are, admittedly, slight. As the only nexus of a single, isolated transaction with Ohio, these acts may not be sufficient, by themselves, to justify the extension of Ohio's regulatory legislation to defendants.
>
> [Appendix at p. 58.]

While classifying this transaction as a single isolated transaction with Ohio the court concluded that the right of Ohio to protect its citizens in the purchase of securities is paramount. This is essentially a police power argument. While police power does exist, there are limits. Bigelow v. Virginia, 421 U.S.809 (1975).

In the present case, it is just fundamentally unfair to extend the Blue Sky laws of Ohio to petitioners.

Conclusion

For the foregoing reasons, it is respectfully requested that the petition for certiorari be granted.



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APPENDIX

Appendix

a. Opinion and Order of United States District Court, Southern District of Ohio, Eastern Division, October 30, 1979.

b. Judgment, Southern District of Ohio, Eastern Division, October 30, 1979.

c. Decision, Sixth Circuit Court of Appeals, June 25, 1981.

d. Judgment, Sixth Circuit Court of Appeals, June 25, 1981.

e. Order, United States Supreme Court, Extending Time for Filing Petition for Certiorari to October 22, 1981.

f. Amendment V to the Constitution of the United States.

g. Amendment XIV to the Constitution of the United States.

h. Ohio Revised Code § 1707.43

No. 80-3123
No. 80-3140

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

RUSSELL E. C. MARTIN,

Plaintiff-Appellee (80-3123)
Plaintiff-Appellant (80-3140)

v.

JAMES C. STEUBNER; NORTHLAND DEVELOPMENT COMPANY OF MINNEAPOLIS, INC., NORTHLAND COMMUNITY ARENA, A LIMITED PARTNERSHIP,

Defendants-Appellants (80-3123)
Defendants-Appellees (80-3140)

APPEAL from the United States District Court for the Southern District of Ohio.

Decided and Filed June 25, 1981.

Before: EDWARDS, Chief Judge; LIVELY, Circuit Judge; and PECK, Senior Circuit Judge.

LIVELY, Circuit Judge. In this action the plaintiff, a resident of Ohio, sought relief from a transaction in which he invested in a Minnesota real estate development at the invitation of the defendants, a Minnesota limited partnership, its corporate general partner and the individual who is president of the corporation. Though the plaintiff sought relief on a number of grounds, the only issue on appeal relates to the failure of the defendants to register the transaction with the Ohio Division of Securities. The district court held that the defendants

violated the Ohio Blue Sky Law, Ohio Revised Code §§ 1707.-01 *et seq.*, in failing to register the "securities" in Ohio and that the plaintiff was entitled to rescind the transaction and to recover his investment. *Martin* v. *Steubner*, 485 F.Supp. 88, 101 (S.D. Ohio 1979).

On appeal the defendants contend that the constitutional guarantee of due process and prohibition against unreasonable burdens on interstate commerce are violated by a requirement that they register with the Ohio Securities Division and defend this action in an Ohio federal court. Early in the proceedings the district court denied a timely motion to dismiss the complaint for lack of *in personam* jurisdiction.

The plaintiff first became aware of the Minnesota real estate development by reading an advertisement placed by the defendants in the midwest edition of the *Wall Street Journal* soliciting purchasers for limited partnership interests in Northland Community Arena. When plaintiff answered the advertisement requesting more information the defendant Steubner wrote the plaintiff describing the investment. The plaintiff had written from Ohio and the letter from the defendant Steubner was addressed to the plaintiff in Ohio. Later the plaintiff visited the real estate development in Minnesota and subsequently received another letter from the defendant containing more information about the proposed investment. Ultimately the plaintiff decided to make an investment and he caused $100,000 to be transferred from his Ohio broker to the defendants' bank in Minnesota. Thereafter the defendants mailed to the plaintiff in Ohio the subscription agreement which the plaintiff signed in Ohio and returned to the defendants.

The district court examined the Ohio statute and analyzed the particular contacts between the transaction and Ohio. Citing the contacts outlined above and keeping in mind "the State's interest in protecting its citizens," the district court found that extension of the requirements of the Ohio Blue Sky Law to this transaction is not unfair and does not violate

due process requirements. 485 F.Supp. at 100. The court also reaffirmed its earlier holding that it had *in personam* jurisdiction over the defendants. *Id.* at 90.

Upon consideration of the briefs and oral arguments of counsel together with the record from the district court, this court concludes that there were sufficient contacts with the state of Ohio to permit Ohio to require registration of this transaction without infringing constitutional rights of the defendants. See *Travelers Health Ass'n* v. *Virginia*, 339 U.S. 643 (1950). The more recent Supreme Court case of *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286 (1980), does not require a different conclusion. The contacts between defendant and the State of Oklahoma in that case were so slight that they failed to satisfy the minimum contacts requirement of due process. Each of these cases must be decided on its own facts.

Our decision on the primary appeal makes it unnecessary to consider the cross-appeal.

The judgment of the district court is affirmed.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Russell E. C. Martin,	:	
Plaintiff,	:	
v.	:	Case No. C-2-76-357
James C. Steubner, et al.,	:	
Defendants.	:	

OPINION AND ORDER

I. Statement of the Case

Plaintiff filed this action on May 13, 1976, asking for damages caused by alleged violations of federal and state securities laws. The case arises out of the purchase of an interest in a limited partnership formed for the purpose of developing an ice-skating arena in a suburb of Minneapolis, Minnesota.

The complaint states six separate grounds for relief. Paragraph One seeks relief under Ohio Revised Code (R.C.)

1707.43, which permits a purchaser of securities to rescind his contract and receive restitution of his purchase price plus court costs when the sale was made in violation of R.C. 1707.01-.45.

Paragraph Two alleges a violation of §12(2) of the Federal Securities Act of 1933, 15 U.S.C. §771(2), which prohibits misrepresentations made with the use of means of interstate commerce in connection with the offer or sale of securities.

Paragraph Three of the complaint alleges a violation of §17(a) of the Federal Securities Act of 1933, 15 U.S.C. §77q, prohibiting misrepresentations made to a purchaser in connection with the offer or sale of securities.

Paragraph Four alleges a violation of §10 of the Securities Exchange Act of 1934, 15 U.S.C. §78aa and Rule 10b-5

promulgated thereunder, which prohibit material misrepresentations made in connection with the sale of securities.

Paragraph Five alleges common law fraud and deceit in the sale of the partnership interest.

Paragraph Six alleges a violation of R.C. 1707.41 which makes any person offering securities for sale or receiving profits from their sale liable to the purchaser for damages caused by written misrepresentations inducing the purchase.

II. Jurisdiction

Defendants dispute the jurisdiction of this Court. Plaintiff asserts jurisdiction under 15 U.S.C. §§77v and 78aa, diversity of citizenship and pendent jurisdiction.

In an earlier ruling this Court found that the admittedly slight contact

defendants had with Ohio was sufficient to confer jurisdiction in this Court over the persons of the defendants. I see no reason to alter that finding. The question is actually one of venue. It has been noted that when suit is brought under both the 1933 and the 1934 Federal Securities Acts, venue may be determined according to the broader provisions of the 1934 Act. Stern v. Gobeloff, 332 F. Supp. 909 (D. Md. 1971). Venue and jurisdiction obtain in every district where the use of the mail is of material importance to the consummation of the allegedly fraudulent scheme. Ritter v. Zuspan, 451 F. Supp. 926, 930 (E.D. Mich. 1978).

The Court has jurisdiction over the persons of the defendants pursuant to the nationwide service provisions of 15 U.S.C. §§77v and 78aa, which authorize

process to be served in any district where the defendant may be found.

As far as the state claims are concerned, since they are properly within the pendent jurisdiction of the federal court, UMW v. Gibbs, 383 U.S. 715 (1966), there is no merit to an objection that venue would be improper if the state claims were sued on alone, or that personal jurisdiction has been obtained only by virtue of the federal securities statutes allowing nationwide service on the federal claims. Wright & Miller, Federal Practice & Procedure §1478; Robinson v. Penn Central Co., 484 F.2d 553 (3d Cir. 1973); U.S. Dental Institute v. American Assn. of Orthodontists, 396 F. Supp. 565, 575 (N.D. Ill. 1975); Puma v. Marriott, 294 F. Supp. 1116, 1121 (D. Del. 1969); Kane v. Central American Mining & Oil, Inc., 235 F. Supp. 559, 568

(S.D. N.Y. 1964). See Hagans v. Levine, 415 U.S. 528 (1974).

The case was tried to the Court. Findings of fact and conclusions of law are set forth below as required by Fed. R. Civ. P. 52(a).

III. Facts

1. Plaintiff is Russell E. C. Martin, 68, who has been retired from a position with the Federal Public Health Service since 1971. He is a high school graduate and has attended college level courses in a night program with a major in Business Administration. Upon his retirement, Martin invested in oil wells. He owns or owned "stripper" wells in Ohio and West Virginia. In 1974 he earned at least $30,000 from the sale of three wells. As of the time of trial, Martin resided in Bremen, Ohio, with his wife, who is a retired school teacher.

2. Defendant Northland Development Company of Minneapolis, Inc. (hereafter NDC), is a Minnesota corporation. Northland Community Arena (hereafter NCA) is a limited partnership formed under the laws of Minnesota. NDC is the general partner of NCA. Defendant James C. Steubner is the president of NDC and of NCA.

3. NCA was formed in 1973 for the purpose of owning and operating an ice skating arena in Brooklyn Park, a suburb of Minneapolis. The arena was completed and opened in the fall of 1973.

4. The arena was very popular. There was greater demand during certain prime periods than the facility could accommodate and defendants found themselves turning down business during those periods. As a result, in 1974 NCA concluded that in order to be financially successful it needed a second sheet of

ice to accommodate the heavy demand in prime time hours.

5. In order to finance construction of an addition to house the second rink, NCA determined to seek additional limited partners to contribute up to $550,000. The funds not provided by new partners' contributions were intended to be borrowed from commercial banks or advanced by NDC.

6. In September 1974, Steubner advertised in the midwest edition of the Wall Street Journal for new partners to contribute to the financing of the planned expansion. The advertisement read as follows:

The heading, printed in large boldface capital letters, reads: "SUBSTANTIAL 1974 TAX SHELTER." In small type there follows:

> Available to investor
> in expanding real estate project.

All or part of $500,000 limited partnership share available (minimum investment $100,000).

Closing must be made by Oct. 1, 1974. Qualified replies only please.

Below this language is set forth the name, address, and phone number of NDC in Minnesota.

7. Plaintiff was interested in locating a tax shelter to cover excess earnings in 1974. Upon reading the ad on or about September 5, 1974, Martin contacted defendants requesting more information.

8. In response, on September 10, 1974, Steubner wrote a letter describing the facility, its planned expansion and the financial aspects of the expansion. The letter, which was intended to be a brief description rather than a detailed explanation of the investment opportunity, was sent to plaintiff in Ohio. It

stated, inter alia:

> The Arena has had almost instant success starting with its opening in November of 1973 and our problem at the moment is that it does not have sufficient capacity to handle the approximately $175,000 to $200,000 in additional business during prime time rental hours.

The letter stated further:

> Our new investor(s) who will be contributing $550,000 in equity capital will end up owning approximately 68% of the entire facility including the original Arena which was built with both debt and equity financing.
>
> We offer tax sheltered income and a guaranteed 10% plus return (after taxes) until the building is refinanced.

9. Sometime in late September 1974, and after receiving the letter, Martin traveled to Minneapolis unannounced. He visited James Steubner and discussed the nature of the investment. During his visit, which lasted between 1-1/4 and 3 hours, Martin toured the arena

with Steubner. Steubner showed Martin the financial statements for NCA, which apparently revealed the NCA's then-current financial posture, but did not show him the financial statements of NDC for 1973 and 1974 which showed a deficit shareholder's equity--$600,000 owed to NDC by NCA. He did, however, explain this debt to Martin in discussing the possibility that NDC would advance more in the event that partnership contributions were not raised in the amount of $550,000.

The parties differ somewhat regarding what information was exchanged orally during plaintiff's visit to Minnesota. It is clear that this conference is the source of much of the information which Martin obtained about the proposed project and which Steubner obtained about Martin. Precisely what

was discussed, however, was the subject of conflicting testimony. In resolving credibility questions necessarily arising from these conflicts, the Court has largely adopted Mr. Steubner's version. At trial, Steubner answered questions sincerely and in a straightforward manner, and his testimony was thoroughly consistent with pretrial discovery such as admissions and answers to interrogatories submitted as evidence in the case. Mr. Martin, on the other hand, while striking the Court as at times sincere in answering questions from the stand, was often evasive and made numerous inconsistent statements. In addition, plaintiff testified that he had occasional losses of memory as a result of the physical illness hypoglycemia. He testified he was suffering from that symptom at the time of his deposition and

at the time of trial. At trial, plaintiff responded thus to the following question:

> Q. Are you having a memory loss, sir, with regard to your conversations with Mr. Steubner in Minneapolis?
>
> A. I can't put it in that kind of language and get a true answer because there are degrees.

Accordingly, the Court finds the following transpired on plaintiff's visit to Minneapolis.

Plaintiff's unannounced arrival gave Mr. Steubner the subjective impression that plaintiff was a businessman wealthy enough to risk traveling across country without knowing whether Steubner would be there. He was dressed in a gray suit and appeared to Steubner as a conservative businessman.

Steubner asked plaintiff about his

business. Martin identified himself as being "in the oil business" as a wildcat oil driller and discussed difficulties he was having obtaining steel for drilling new wells. Martin told Steubner he needed somewhere between $25,000 and $38,000 for tax shelter because he had not been able to get pipe to drill new wells in order to shelter income from others. At no time did plaintiff indicate that he was retired. Defendant did not ask plaintiff what his income was but did inform plaintiff that he needed a net worth of three times the amount of his investment. Steubner did ask plaintiff whether he had invested in other limited partnerships, and plaintiff responded that he owned several farms in Minnesota. Steubner explained to plaintiff that he would get no interest and that his investment was in the equity fund in NCA.

Judging from the questions plaintiff asked about the financial statements, Steubner concluded it was "very obvious" that plaintiff understood what was on them, and that he understood the nature of partnership investment and tax shelter.

Finally, Steubner asked plaintiff whether the investment was one he could afford in the sense that a risk was involved. Martin indicated it was and stated that he was concerned that the projected $185,000 loss for 1974 could all be used on his return. Upon his departure, Martin indicated he was seriously interested but did not know how much he might invest.

Based on the statements made by Steubner and the documents provided for Martin's examination, the Court finds that the plaintiff was aware or

reasonably should have been aware of the risky nature of the investment offered to him.

10. At the end of his visit with Steubner, plaintiff was favorably impressed but had not yet decided whether to invest. Plaintiff returned to Ohio, and on October 1, 1974, sold his oil wells for $32,000 ($40,000 less the depletion allowance) and telephoned Steubner with additional inquiry. Specifically, Martin wanted written confirmation that he could utilize the projected tax loss of $184,000 for the entire 1974 year even if he invested as late as October 1974.

11. On October 3, 1974, Steubner forwarded to Martin a letter from the accounting firm of Haskins & Sells confirming that plaintiff could take the tax loss on his 1974 tax returns.

12. On October 3, 1974, Steubner

responded to Martin's phone call by letter, stating, in pertinent part:

> In the event we do not reach the total $550,000 it is our intention to close the transaction and temporarily finance the balance of the construction through our bank lines. We would however complete the partnership units as soon as possible. However, judging by the number of parties interested and committed at this time we do not feel that the completion of the offering will be delayed or if it is it would be a small percentage.

13. At the time of the October 3, 1974, letter, although the NDC's bank lines were committed to make a loan, the NCA project had prompted a number of inquiries but no written or enforceable commitments from potential partners. Ultimately, only two new partners contributed: Mr. Martin and a Mr. Ogle, making a joint contribution of $350,000.

14. On or about October 12, 1974, while in West Virginia, plaintiff called

defendants' offices, informed them that he would invest $100,000 and inquired where the money was to be sent. Acting on instructions from Steubner, Martin wired the funds from his Ohio broker to defendants' bank in Minnesota.

15. On October 17, 1974, Steubner mailed to plaintiff in Ohio the subscription agreement, which stated in part:

> I realize that this is a speculative venture and that earnings therefore may be uncertain, I acknowledge receipt of information pertinent to evaluation of this investment, I am a "sophisticated investor" as defined by the Internal Revenue Service and the Federal Securities and Exchange Commission, and that I have a financial net worth at least three times greater than the amount of this investment.

This paragraph was contained in similar agreements which had been shown to, and read by plaintiff at the time of his visit to Minneapolis. Plaintiff read

this, signed the subscription agreement, and mailed it back to Steubner in Minnesota on October 24, 1974.

16. Martin enclosed a letter to Steubner inquiring about "interest payments," saying in part:

> The $100,000 which I had wired to your bank on the 14th of October, I hope commenced working in my behalf, immediately. If at all possible, please take the necessary steps to have interest payments mailed to me in the interim in case your accountant cannot compensate for subscriptions which are apparently arriving over a span of several weeks.

The letter was typed on business stationery with a letterhead of the "Oil Field Research and Development Company." Martin had crossed out the printed New York address with ink and had typed in his Bremen, Ohio, post office box address.

17. Distressed by Mr. Martin's reference to interest payments, Steubner wrote Martin on November 1, 1974:

I hope there was no misunderstand-

ing that we would be paying interest as such on your partnership contribution. These are invested as equity funds in the Arena and you are in effect an equity owner through your partnership interest.

18. On December 15, 1974, plaintiff wrote Steubner, thanking Steubner for informing him about progress on construction of the arena and requesting a copy of the Limited Partnership Agreement and Certificate of Limited Partnership dated October 1974 because he did "not want the IRS to say [he] was making a last minute deal for tax purposes." Martin expressed no dissatisfaction with the transaction in this letter.

19. On January 5, 1975, Steubner sent the requested documents to the partners: Mr. Frye, Mr. Ogle and Mr. Martin.

20. Construction was begun in late 1974 on the arena and proceeded on schedule.

In February, however, catastrophe struck. The rinks were cooled by liquid freon running through some 20 miles of steel tubing connecting both buildings. While hooking up the second arena to the system, water entered the pipes and contaminated the entire system. Both buildings were shut down for five to six weeks. The disruption this caused the community in rescheduling tournament games and other skating activities destroyed positive community relations for the arena.

21. Meanwhile, on March 3, 1975, Martin wrote Steubner, explaining that he needed only $35,000 worth of tax shelter from the arena and inquiring when the second arena was to be ready for use.

22. On March 14, 1975, Steubner sent Martin the IRS Form K-1 reporting his share of the NCA partnership for 1974

and wrote Martin explaining the mishap in construction and the plans to open the new rink the following week.

23. Thereafter, plaintiff did not express dissatisfaction with his contract but wrote numerous letters suggesting ways in which the arena might be saved. Among his recommendations were several sophisticated financing concepts such as bridge financing, industrial revenue bond financing, merger with another company (letter of August 12, 1975), and the names of several corporations to whom it might profitably be sold (letter of August 30, 1975).

24. Defendants conducted lengthy negotiations with municipal officials for the sale of the arena to the City of Brooklyn Park in the fall of 1975. The proposition was placed on the ballot but fell through when the voters, by referendum, refused to approve the sale.

25. In December 1975, plaintiff instructed his attorney, Mr. Jolin, to obtain his money back.

26. On April 23, 1976, plaintiff declared the transaction void, tendered a return of the partnership interest and demanded a return of his investment.

27. In the meantime, after studying a number of options, defendants have, with the investment of substantial personal effort and personal funds, transformed the properties into an operating enterprise. The two rinks now house general recreational and sports facilities for athletic activities such as swimming, tennis, racquetball and weightlifting.

28. Plaintiff has used the losses from the arena for tax shelter purposes every year since he made his original investment.

29. The partnership interest sold to Martin was never registered in Ohio.

30. No registration for NCA was filed with the Minnesota Division of Securities because it was exampt under Minnesota law as a private placement.

IV. Discussion of Law

A. Section 12(2) of the Federal Securities Act of 1933.

This section provides for the restitution of the security price paid plus interest in a suit against the seller for communicating an untrue statement or the omission of material facts necessary to avoid making the statements misleading. Plaintiff's case under this section is barred by the one-year statute of limitations set forth in §13 of the 1934 Act, 15 U.S.C. §77m. This action would have had to be brought within one year after the discovery of the alleged untrue

statements or material omissions was or should have been made by the exercise of reasonable diligence.

While there was inconsistency between the plaintiff's trial and deposition testimony regarding when he felt "taken," I find that the following admissions made in his deposition testimony indicate plaintiff's state of mind regarding his reaction to the defendants' November 1, 1974, letter informing him that no interest payments would be made:

> A. This was the first inkling I had.
>
> Q. Now, after you read that sentence, you say you got an inkling of what?
>
> A. That this was not an ethical and good business dealing operation.
>
> Q. Now, did you have the feeling at that point in time you'd been taken?

A. I wasn't positive, but I had a feeling.

Q. You had a pretty strong feeling, but you weren't positive?

A. I couldn't say how strong, but I was hoping for the better at that time, and still trusting the man.

Q. You had a feeling you were in trouble, but you weren't sure at that point in time?

A. Yes.

Q. Now, after you had this feeling you were in trouble, what steps did you take at that point in time to determine whether or not you were in trouble? What did you do?

A. Nothing.

Q. Why?

A. I felt I had no choice. I felt I was taken. I was just trusting it would shape up all right, and my suspicions were wrong.

Deposition, 82-83. Upon receipt of this

etter, plaintiff was aware that he misunderstood the nature of his investment. This knowledge should reasonably have prompted him to exercise due diligence to discover whether untrue statements or omissions had been made to induce his purchase. He failed to do so. Instead, he held onto his in interest, made use of the tax shelter it provided him, and advised the defendants continually regarding the management of his partnership, until April 1976 when he tendered his subscription agreement and offered to rescind his purchase. For the purposes of the §12(2) claim, at the latest, plaintiff should have filed suit within one year from receipt of the defendants' November 1, 1974, letter. His failure to file within that period bars this claim under 15 U.S.C. §77m.

B. Section 10(b) and Rule 10b-5 of the Securities Exchange Act of 1934

Count IV of the plaintiff's complaint sets forth a claim of a violation of Section 10(b) of the Securities and Exchange Act of 1934, 15 U.S.C. §78(j) and Rule 10b-5 promulgated thereunder. That section makes it unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstatecommerce or of the mails, to make fraudulent representations or omissions in connection with the purchase or sale of securities. The law is well settled that a defendant cannot be liable under this section unless he has acted with scienter, that is he must have intended the wrongdoing; the statute does not apply to negligent conduct. Ernst & Ernst v. Hochfelder, 425 U.S. 185, 212, 214 (1976).

The letters of September 10, 1974 and October 3, 1974, constituted offers to sell a security. The plaintiff contends that those letters contained untrue statements of material fact, including

> (a) that NCA had been an instant success;
>
> (b) that NDC general partner, had made an equity investment of $81,000 in NCA;
>
> (c) that there were commitments for all or substantially all of the additional $550,000 needed by NCA; and
>
> (d) that defendants guaranteed a ten percent return after taxes.

The plaintiff further contends that those letters contain omissions of facts necessary to make the defendants' statements not misleading. These alleged omissions are as follows:

> (e) that there were no binding commitments for substantially all of the $550,000 sought to be raised by NCA;

(f) that NDC, as general partner of NCA, had not made an equity investment of $81,000 in NCA;

(g) that NDC had a deficit net worth;

(h) that NCA had a deficit net worth;

(i) that NDC and NCA were not in a financial position to guarantee a ten percent plus return after taxes;

(j) that NCA had lost money;

(k) that Steubner had been an executive officer of other companies which had failed.

I find that the statement in the letter of September 10, 1974, that "the arena has had almost instant success" was an untrue statement. As is noted below, "success" was intended to refer to market rather than financial success. But a highly reasonable inference from this statement would bethat the arena is a

currently profitable venture, which was clearly not true.

The plaintiff next contends that the statement that the general partner, NDC, had made an equity investment of $81,000 in NCA is one of the untrue statements madein the letters of September 10, 1974 and October 3, 1974. Although there was in the record some dispute whether this statement was in fact untrue, I find that this statement cannot form the basis for a claim of misrepresentation because it was not communicated to Martin before he madehis investment.[1] The statement referred to was made in a letter dated January 22, 1975, several months after Mr. Martin made his $100,000 investment. Accordingly, it is difficult to see how the statement whether true or false would have played a material role in inducing Mr. Martin to invest.

Next plaintiff contends that Steubner

made the untrue statements that there were commitments for all or substantially all of the additional $550,000 needed by NCA. The simple fact is that neither letter contained such a statement. In the September 10 letter, it is clear that as of the time of the writing no money had been invested in the new project. At the time of the October 3 letter, it is also clear that Steubner did not have the investment that he wanted. That is revealed by the language "in the event that we do not reach the total $550,000 . . . ."

Next plaintiff complains that the defendants stated that they would guarantee a ten percent return after taxes. The language referred to appears in Steubner's letter of September 10:

> We offer tax sheltered income and a guaranteed ten percent plus return (after taxes) until the building is refinanced.

As Mr. Steubner explained at trial, the guaranteed ten percent meant that by virtue of the tax shelter a limited partner would save at least ten percent of his investment if he is above the 50% tax bracket. Thus an investment of $100,000 would yield at least a $10,000 tax savings. This is by no means clear from the language in the letter. On the other hand, there is no other more reasonable inference from the language of the letter. It does not speak in terms of interest; it does not mention dividents. I do not find this statement to have been untrue when made. Moreover, Mr. Steubner's testimony that he explained what was meant by this statement to Mr. Martin during his visit is to be credited as clearing up any confusion that phrase created.

Plaintiff next complains of mis-

statements or omissions of relevant facts necessary to avoid misleading a potential investor. First plaintiff claims that it is not clear from the letter of October 3, 1974, that there were no binding commitments for substantially all of the $550,000 sought to be raised for the second arena. The language of that letter does imply that there were "a number of interested and committed parties." The failure to amplify this statement is the sort of omission which is likely to mislead a potential investor. Similarly, the failure to inform Mr. Martin of fact (g) above regarding the deficit net worth of NDC is also the kind of omission upon which liability may be founded. The same is not true, however, of (f), for the reasons above-stated; of (h), because the financial statements of NCA which the

parties discussed on plaintiff's visit clearly reveal the deficit net worth of the arena partnership;[2] of (i), because it has not been establishedthat such a statement is, in fact, true; or (j) since I believe it is clear from the information plaintiff did have available to him that NCA had lost or was losing money--that is, that without the second rink, it could not be a profitable venture, clearly, the sizeable tax shelter offer implied a presently unprofitable undertaking.

Finally, information contained in (k), regarding Mr. Steubner's past business history is of the sort upon which a reasonable investor might rely in making his decision to invest.

Accordingly, I hold that the statement that the arena was an instant success was a misstatement of fact; the failure to provide information that there were, at the time of the October 3 letter no binding partnership commitments, that

the general partner NDC had a deficit net worth, and that Mr. Steubner's business history included stewardship in another company which had failed, were omissions to state material facts within the meaning of Rule 10b-5.

Notwithstanding that conclusion, I do not find defendants' misstatement or omissions to have been made with the scienter required by §10(b) and Rule 10b-5.

The defendants' original ad in the Wall Street Journal indicated plainly that the investment sought was for tax shelter purposes. Plaintiff sought tax shelter and got it. Steubner's attempt in his letter of September 10 to apprise plaintiff generally of the nature of the investment was largely adequate. Steubner testified that "success" as used in that letter was meant to be understood to

refer to the high popularity and demand for the arena--market success--rather than the financial success of the arena. This is consistent with the last half of that sentence, which states "and our problem at the moment is that it does not have sufficient capacity to handle the approximately $175,000 to $200,000 in additional business during the prime time rental hours."

Given the circumstances surrounding Mr. Martin's visit to Minneapolis, Mr. Steubner's omission to discuss or put in writing all conceivably material information is understandable. In the usual securities fraud case, it is the seller, or insider, who misleads the buyer, or outsider. In this case, however, it appears that Martin misled Steubner into believing that he was a sophisticated investor, thoroughly familiar with the workings of limited

partnerships and speculative ventures. By arriving unannounced to look over the arena, Martin inadvertently made the impression of one wealthy and powerful enough to travel halfway across the country without regard to making appointments. He did much to further this image by identifying himself as "in the oil business," as owning several farms and by indicating thathis income equalled the necessary three times his investment.

Steubner did not show Martin financial statements of NDC which indicated that that corporation had a deficit net worth in 1973 and 1974. Financial statements for those years indicate that liabilities exceeded assets of $2,276,668 by $1,052 in 1973 and assets of $3,644,941 by $3,980 in 1974. On the other hand, Steubner did explain the roleof NDC and did inform Martin of the

$679,007 that NDC had advanced to NCA, of which $575,000 was a mortgage loan and the remainder was a direct loan from the general partner NDC. Based on this, I cannot find any intent to defraud or misrepresent on Steubner's part with respect to NDC. From all the evidence adduced at trial and after observing the demeanor of the parties as witnesses, I believe that Steubner honestly believed that Martin was a wealthy, sophisticated investor who knew the meaning of the investment Steubner offered to him and that Steubner made the offer, described the transaction and the potential of the project with no intent to defraud.

In addition, there was no evidence that the NCA project was in fact a fraudulent schemeor dangerously risky or that it would not have been profitable barring the accident which occurred

during construction. There is simply no evidence that the defendants entered into this transaction with any fraudulent intent. Accordingly, I hold the defendants are not liable for violation of 15U.S.C. §78(j) and Rule 10b-5.

C. Other Fraud Allegations

For the same reasons, I find no lilability exists under §17(a) of the Securities Act of 1933, 15 U.S.C. §77q, R.C. 1707.41, nor under common law fraud and deceit principles. Sanders v. John Nuveen & Co., 554 F.2d 790 (7th Cir. 1977); SEC v. Coffey, 493 F.2d 1304, 1314 (6th Cir. 1974); Kellman v. ICS, Inc., 447 F.2d 1305 (6th Cir. 1971); Greenwalt v. Goodyear Tire & Rubber Co., 164 Ohio St. 1, 128 N.E.2d 116 (S.Ct. 1955).

D. Ohio's Blue Sky Law

As noted above, ¶1 of plaintiff's complaint alleges a violation of R.C.

1707.43. That section provides in pertinent part as follows:

> Every sale or contract for sale made in violation of §§1707.01 to 1707.45, inclusive, [the Chapter entitled "Securities"] of the Revised Code, is voidable at the election of the purchaser. The person making such sale or contract for sale, and every person who has participated in or aided the seller in any way in making such sale or contractfor sale, are jointly and severally liable to such purchaser in an action at law in any court of competent jurisdiction upon tender to the seller in person or in open court of the security sold or of the contract made, for the full amount paid by such purchaser and for all taxable court costs, unless the court determines that the violation did not materially affect the protection contemplated by the violated provision.

As I read the statute, it imposes liability without fault if the following elements are proved: there must be a "sale"; of a "security" in violation of any of the

noted provisions of the securities cnapter which violation materially affects the protection contemplated by the violated provision.

Plaintiff's theory of recovery under R.C. 1707.43 is that there was a sale of a security in Ohio by the defendants to the plaintiff consisting of a limited partnership interest in NCA, that the sale was made in violation of R.C. 1707.09 which provides that all "securities . . . shall, before being sold in this state, be qualified in the manner provided by this section"; and finally that these violations materially affected protection contemplatedby the violated provisions because registration of securities under the Act is essential to initiate the procedures set forth in it to protect the public. Miller v. Griffith, 28 Ohio Op. 278. 98 Ohio L.

Abs. 488, 196 N.E.2d 154 (Ct. App. Columbiana Co. 1961). Plaintiff points out that defendants have the burden of proof to establish that the violations did not materially affect the protection contemplated, Biernbaum v. Midwest Oil & Gas Co., 108 Ohio App. 560, 160 N.E.2d 410 (1959), and failed to present evidence on this question.

Defendants do not contest plaintiff's legal conclusion that the $100,000 is a "security" within the definition of R.C. 1707.01(b) as "any certificate or instrument which represents title to or interest in . . . the capital, assets, profits, property or credit of any person . . . ." Nor do they contest that the sale of the partnership interest was a "sale" as defined by R.C. 1707.01(c)(1) and (2). The definition of "sale" embodied in these subsections is quite

broad, including the full meaning of sale as applied by or accepted in courts of law or equity, every disposition or attempt to dispose of a security or of an interest in a security, a contract to sell, an exchange, an attempt to sell, a solicitation of a sale, a solicitation of an offer to buy, a subscription or an offer to sell, and any actby which a sale is made.

However, defendants do contest the applicability of the Ohio Blue Sky Law to them. They argue that the sale of this security was not a violation of that act because they were under no duty to register this transaction in Ohio. The gist of defendants' argument is that this transaction failed to fall within the outer parameters of the territorial reach of Ohio's securities law.

The law concerning the applicability of a state Blue Sky Law or interstate transactions and foreign defendants is far from clear. See Loss & Cowell, Blue Sky Law, 181-229 (1959). The cases which do consider the question defy generalization and tend to raise more questions than they answer. Compare Aldens, Inc. v. LaFollette, 552 F.2d 745 (7th Cir. 1977); Gaillard v. Field, 381 F.2d 25, 28-29 (10th Cir. 1967), Cert denied, 389 U.S. 1044; Doherty v. Bartlett, 81 F.2d 920 (1st Cir. 1936); and Lane v. Griswold, 273 N.C. 1, 9-12, 159 S.E.2d 338, 344-46 (1968) with Rousseff v. Dean Witter & Co., 453 F. Supp. 774 (N.D. Ind. 1978); Marketlines, Inc. v. Chamberlain, 63 Ill. App. 2d 274, 211 N.E.2d 399 (1965); and People v. Fairfax Family Fund, Inc., 235 Cal. App. 2d 881, 47 Cal. Reptr. 812 (1964).

This inquiry is distinct from the issues discussed above with regard to the Court's jurisdiction. As an inquiry into the territorial reach of a state's legislative power, it is also different from the question of the territorial reach of a state's judicial power. Like the question of state judicial jurisdiction, however, the scope of state regulatory legislation is limited by due process considerations of fundamental fairness.

The section which plaintiff claims has been violated by the defendants, R.C. 1707.09, clearly requires that securities subject to registration by qualification are those that will be "sold in this state." The relevant question, then, becomes whether, within the contemplation of this statute, the "sale" of the partnership interest occurred "in this state." The parties have offeredand the Court

finds no Ohio case construing this phrase. This phrase is typical in Blue Sky legislation, and is implied in statutes which do not contain it. Loss & Cowett, Blue Sky Law, supra, at 211. Turning to discussions of other courts in other jurisdictions for guidance, I find that the question whether a statute applies as a simple matter of statutory construction invariably becomes inextricably bound up with the question whether it may apply as a matter of constitutional due process.

That the phrase doesnot mean literally what it says is illustrated by the interpretation given it in a 1935 opinion of the Ohio Attorney General. A strict application of the statutory language would make an advertisement in an out-of-state publication--as "solicitation of a sale, a solicitation of an offer to buy, or an offer to sell"--a "sale in this

state" when read by persons in Ohio. Yet the Ohio Attorney General stated:

> The offering and sale of securities by a resident of one state to a resident of another state through the mail by means of advertisement in periodicals ublished in a state other than that of the purchaser constitutes interstate commerce. It has been repeatedly held by the Supreme Court of the United States that in the exercise of their police power the states are not precluded from indirectly burdening interstate commerce, subject to certain limitations. This point was involved in the case of Hall v. Geiger Jones, 242 U.S. 539, the court recognizing that the Ohio Securities Act there under consideration only regulated the sale of certain securities within this state, which securities might have been acquired by the seller within the state in interstate commerce previous to such offering and sale in Ohio.
>
> . . . .
>
> It is my opinion that advertisements offering

> securities by non-resident and non-licensed dealers, which securities are not registered under the Ohio Securities Act, are not prohibited by such act when such advertisements are contained in newspapers, magazines or periodicals published outside of the state and offered for sale on newsstands within this state or sent to subscribers by mail. 1935 Ohio A.G. Opinions 1423, 1424-26.

The meaning of the term "sale in this state," thus is not construed to be as broad as a plain reading of the statute may indicate. A careful reading of the opinion reveals that the limits the Ohio Attorney General placed on the statute's reach were constitutional, rather than statutory. Id. at 1424. Given the broad definition of "sale" in the statute, its permissible breadth is limited by United States constitutional due process considerations.

In Travelers's Health Association v.

Virginia, 339 U.S. 643 (1950), the Supreme Court, without analyzing the application of the statute by its terms, held that application of a Virginia Blue Sky provision, making it unlawful for any person to offer for sale any securities in the state without registering them, to a Nebraska mail order health insurance business which it had been stipulated had never entered the state of Virginia, did not offend due process. The court distinguished its decision in Minnesota Association v. Benn, 261 U.S. 140 (1923), an early judicial jurisdiction case in which the court had found the circumstances insufficient to support personal jurisdiction on a "doing business" theory:

> But where business activities reach out beyond one state and create continuing relationships and obligations with citizens of another state, courts need not resort to a fictional "consent" in order

> to sustain the jurisdiction of regulatory agencies in the latter state.

Traveler's Health, supra, at 647. Taking the interest of the state in seeing the insurance obligations faithfully observed together with the contacts and ties of the appellants with Virginia residents in that case, the Court held that the state was justified in subjecting the defendants to cease and desist proceedings under the Virginia Blue Sky Law. Id. at 648. That decision does not conclusively resolve the question in this case, however, since the Supreme Court's decision stands for the proposition that it is not unconstitutional to apply the Blue Sky Law of a state to a sale affected in that state to a person who is not within its boundaries either physically or through agents when there is some continuity to the selling effort. L. Loss, 1 Securi-

ties Regulation 80 (1961). The opinion expressly states that in that case the Nebraska "association did not engage in mere isolated or short-lived transactions." Thus as Professor Los points out, "the Traveler's Health case on its facts is not a square holding that the law of the state of the buyer's residence could be constitutionally applied to a single isolated transaction . . . ."

The case does indicate, however, that the question of the scope of legislative power on out-of-state parties will necessarily be a question to be resolved anew in each case upon the examination of the particular statutory provision in question and the particular contacts and ties that a transaction has with the regulating state.

In the instant case defendants' contact with Ohio is minimal. Defendants

have no place of business in this state; they never entered the state nor have they conducted any business here; defendants did not solicit telephonically in Ohio; and any contact with this state through the use of the mails was in response to inquiries put by the plaintiff. Defendants do have some nexus with the state of Ohio by virtue of: (1) their advertisement in the midwest Wall Street Journal, published in Chicago, with circulation in Ohio; (2) their mailing, in response to plaintiff's inquiries, the letter of September 10, 1974, to Ohio; (3) their mailing, likewise in response to plaintiff's request, the October 3, 1974, letter regarding plaintiff's tax loss, to Ohio; and finally (4) their mailing of the unsigned subscription agreement to Ohio on October 17, 1974, where it was signed and returned to Minnesota by the plaintiff.

I have some difficulty justifying the application of the Ohio Blue Sky Law to the defendants in this case, based on the minimal contacts listed.

First, the Ohio Attorney General's Opinion above-cited indicates that the Attorney General of Ohio would not consider the Ohio Blue Sky Law applicable to the advertisement of non-registered securities in the midwest Wall Street Journal.

Assuming that this remains the law of Ohio, the question remains whether the mailing of two letters and the subscription agreement to Ohio for plaintiff's signature constitute a "sale in this state." These contacts are, admittedly, slight. As the only nexus of a single, isolated transaction with Ohio, these acts may not be sufficient, by themselves, to justify the extension of

Ohio's regulatory legislation to defendants. But viewed together with the State's interest in protecting its citizens from the sale of securities which have not been first subjected to the State's investigative and evaluative processes, such an extension does not appear unfair or to offend due process concepts.

Because the statute bans any sale in violation of the securities chapter, without regard to fault, a conclusion that the particular transaction at issue was neither fraudulent nor unnecessarily speculative would not affect the applicability of the statute. Crane v. Courtright, 2 Ohio App. 2d 125, 206 N.E.2d 913 (Franklin Co. 1964). Nor does such an argument diminish the importance of the state's interest in protecting its citizens from their own "stupidity,

gullibility, and avariciousness." Bronaugh v. R. & E. Dredging Co., 16 Ohio st. 2d 35, 242 N.E.2d 572 (1968).

In Southern Machine Co. v. Mohasco Industries, Inc., 401 F.2d 374 (6th Cir. 1968), the Court of Appeals for this Circuit recognized that the Supreme Court, in Traveler's Health, in the course of rejecting the contention that a state's power to regulate must be determined by a conceptualistic discussion of theories of the place of contracting or of performance," instead accorded great weight to the "consequences" of the contractual obligations in the state where the insured resided and the degree of interest that state had in seeing that those obligations were faithfully carried out."

In the present case, it is reasonable to have expected the defendants to have contemplated that the acts culminating in the completed transaction would create a sizeable partnership interest in Mr. Martin, an Ohio citizen, resulting in a continuing relationship between the defendants in Minnesota and Martin in Ohio. The relationship created was isolated,but not short-term. The State's interest in protecting its citizens with respect to such an investment is strong.

Finally, I believe it is noteworthy in this connection that the portion of the Act which plaintiff seeks to apply to the defendants is not punitive but simply permits the purchaser to rescind the transaction and puts the parties in the position they were in before the contract was entered into.

In sum, I believe that the contacts of the defendants with Ohio, taken together with the interest Ohio has to see that its citizens are protected in such a purchase of securities, and the rescissory nature of the statutory remedy, justify viewing the transaction in this case as occurring "in this State" for purposes of R.C. 1707.43. Accordingly, since plaintiff has tendered his subscription agreement to the defendants, they are jointly and severally obligated to refund to Mr. Martin the $100,000 he paid for it, together with court costs.

Defendants argue at length that plaintiff's laches bars his right of rescission and that his continued acceptance of benefits (in the form of tax shelter) estops his recovery. These are equitable doctrines that apply in

common law suits for restitution. Plaintiff's rescissory remedy in this case is governed by R.C. 1707.43. That provision sets a two-year statute of limitations on bringing suit pursuant to it. This indicates to me that the legislature considered the issue of a purchaser resting on its rights and chose to resolve that issue by the use of a two-year limitation rather than the equitable balancing inhering in a laches analysis. In any event, I believe that the brining of suit within the two-year period set by law does not constitute laches.

Similarly, the statute sets forth the conditions under which a purchaser can be estopped from recovery. If, within two weeks of the sale, a purchaser receives an offer to rescind the transaction, and the purchaser fails to accept such offer of rescission within 30

days, the purchaser may not benefit from the statutory remedy. The statute says nothing of acceptance of benefits inuring indirectly to the purchaser by virtue of the sale pending an acceptance by the seller of the purchaser's offer to rescind. Indeed, invocation of R.C. 1707.43 does not invalidate the security itself, see, Warren Peoples Market Co. v. Corbitt, 114 Ohio St. 126, 151 N.E. 51 (1926); and it is reasonable to expect that until the sale has been legally rescinded, the buyer's ownership interest continues.

While the law stated by defendants is good contract law in the ordinary case of restitution, it is inapplicable to the statutory remedy because the statute provides only partial restitution. The

statute provides for the exchange of the property interest conveyed for the original price paid for it, regardless of any change in value of the interest or any benefits that it may have conferred during the period it was held by the purchaser. Thus, the statute does not mandate the return of interest payments or dividends earned on a security, nor does it require the seller to pay an appreciated market value.

Finally, while the statute requires suit to be instituted within the two years, it sets no time limit for a purchaser's tender of the interest sold and expressly provides that this may be done in open court. Thus, even if any previous offers to rescind were waived by subsequent actions, Martin's repeated offers in the pleadings of this case and at trial in open court would satisfy the

statutory condition precedent to recovery. Mr. Martin's legal responsibilities under the Internal Revenue Code upon rescission of the transaction do not concern us here as to the issues of this case, I hold that Martin's acceptance of tax benefits by virtue of his partnership interest after his request for rescission and before rescission is effectuated does not estop Martin from resort to the statutory remedy accorded by R.C. 1707.43.

Conclusion

I conclude that plaintiff has failed to establish that defendants acted with the necessary scienter to prevail on claims stated in Paragraphs Three, Four, Five and Six of the complaint; that plaintiff's claim in Paragraph Two is barred by the applicable statute of limitations; and that plaintiff is

entitled to restitution of the $100,000 paid for the partnership interest under R.C. 1707.43 as stated in Paragraph One.

It is so ORDERED.

_____

Robert M. Duncan,

Judge

[1]It is true that Martin did see and discuss the "Investment Plan" before his purchase during his visit to Minneapolis. That document lists as among the original equity investors the general partner to the extent of $81,000. But this information is not a "statement" of contribution; rather it is a tentative projection to which defendants may not reasonably be held.

[2]Steubner showed the financial statements of NCA to Martin on his visit and discussed them. The "Statement of Operations and Deficit for the Month ended August 30, 1974" shows a net loss of $119,761 for the arena for the year to date. That figure is shown as $138,314 on the September 30, 1974, statement.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Russell E.C. Martin
Plaintiff

vs. Case Number C-2-76-357

James C. Steubner,
et al.,
Defendant

J U D G M E N T

This action came on for consideration before the Court, the Honorable Robert M. Duncan, United States District Judge, presiding. The issues having been considered and a decision having been duly rendered.

IT IS ORDERED AND ADJUDGED THAT: plaintiff has failed to establish that defendants acted with the necessary scienter to prevail on claims stated in Paragraphs Three, Four, Five and Six of the complaint; that plaintiff's claim in Paragraph Two is barred by the applicable statute of limitations; and that plaintiff is entitled to

restitution of the $100,000.00 paid for the partnership interest under R.C. 1707.43 as stated in Paragraph One.

Dated at Columbus, Ohio, this 30 day of October, 1979.

JOHN D. LYTER, CLERK

By _____
Deputy Clerk

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

Nos. 80-3123
80-3140

C-2-76-357

RUSSELL E. C. MARTIN,

Plaintiff-Appellee (80-3123)
Plaintiff-Appellant(80-3140)

v.

JAMES C. STEUBNER; NORTHLAND DEVELOPMENT COMPANY OF MINNEAPOLIS, INC., NORTHLAND COMMUNITY ARENA, a Limited Partnership,

Defendants-Appellants (80-3123)
Defendants-Appellees (80-3140)

Before: EDWARDS, Chief Judge; LIVELY, Circuit Judge; and PECK, Senior Circuit Judge.

J U D G M E N T

APPEAL from the United States District Court for the Southern District of Ohio.

THIS CAUSE came on to be heard on the record from the United States Dis-

trict Court for the Southern District of Ohio and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

It is further ordered that Plaintiff-Appellee recover from Defendants-Appellants the costs on appeal, as itemized below, and that execution therefor issue out of said District Court, if necessary.

ENTERED BY ORDER OF THE COURT

_____
Clerk

Issued as
Mandate: August 19, 1981 A True Copy.

COSTS: None

Filing fee....$
Printing $

Total $

Attest:

_____
Deputy Clerk

Supreme Court of the United States

No. A-222

RUSSELL E.C. MARTIN,

Petitioner

v.

JAMES C. STEUBNER, ET AL.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including October 22, 1981.

Associate Justice of the Supreme Court of the United States

Dated this 14th

day of September, 1981

§ 1707.43 Remedies of purchaser in unlawful sale.

Every sale or contract for sale made in violation of sections 1707.01 to 1707.05, inclusive, of the Revised Code, is voidable at the election of the purchaser. The person making such sale or contract for sale, and every person who has participated in or aided the seller in any way in making such sale or contract for sale, are jointly and severally liable to such purchaser, in any action at law in any court of competent jurisdiction, upon tender to the seller in person or in open court of the securities sold or of the contract made, for the full amount paid by such purchaser and for all taxable court costs, unless the court determines that the violation did not materially affect the protection contemplated by the violated provision.

No action for the recovery of the purchase price as provided for in this section, and no other action for any recovery based upon or arising out of a sale or contract for sale made in violation of sections 1707.01 to 1707.45, inclusive, of the Revised Code, whether based upon contract or tort, and whether legal or equitable in nature, shall be brought after two years from the date of such sale or contract for sale.

No purchaser is entitled to the benefit of this section who has failed to accept, within thirty days from the date of such offer, an offer in writing made after two weeks from the date of such sale or contract of sale, by the seller or by any person who has participated in or aided the

seller in any way in making such sale or contract of sale, to take back the security in question and to refund the full amount paid by such purchaser.

AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES

AMENDMENT V

No person shall be held to answer for capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Opposition

Office - Supreme Court, U.S.
FILED
NOV 27 1981
ALEXANDER L. STEVAS,
CLERK

81-909

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

Russell E. C. Martin :

Respondent :

v. : Case No. 81-9099

James C. Steubner, et al. :

Petitioners. :

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

Bruce E. Reppert
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Counsel for Respondent

Of counsel:
Robert C. Perrin
David K. Frank

I. QUESTION PRESENTED FOR REVIEW

Is it a denial of due process to extend the legislative reach of the Blue Sky Laws of Ohio to encompass a Minnesota resident who knowingly and intentionally solicited purchases of securities from an Ohio resident through advertisements in newspapers known to circulate within Ohio, through correspondence directed specifically to the Ohio resident and through telephone calls with the Ohio resident in Ohio?

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III. TABLE OF AUTHORITIES

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McGee v. International Life Insurance Co., 355 U.S. 220 (1950), p. 8, 13 & 16.

Travelers Health Ass'n v. Virginia, 339 U.S. 643 (1950), p. 8, 10, 12 & 16.

IV. OFFICIAL AND UNOFFICIAL REPORTS

Trial Court: 485 F. Supp 88 (S.D. Ohio 1979)

Court of Appeals: 652 F.2d 652 (6th Cir. 1981)

V. STATEMENT OF THE CASE

Respondent does not take exception to Petitioners' Statement of the Case. Respondent would amplify Petitioners' Statement by reviewing the relevant contacts between Petitioners and Respondent, most of which had a nexus with Ohio:

1. Respondent is and was at all times relevant to this litigation an Ohio resident.
2. The Petitioners are and were at all times relevant to this litigation Minnesota residents.
3. In September, 1974, Petitioners placed an ad in the Chicago Midwest Edition of the Wall Street Journal soliciting purchases of limited partnership interests in Northland Community Arena. This edition of the

Wall Street Journal is circulated in Ohio.

4. On September 5, 1974, Respondent, from, Ohio contacted Petitioners in Minnesota for more information.

5. On September 10, 1974, Petitioners wrote a letter to Respondent describing the investment. This letter was delivered in Ohio.

6. In late September, 1974, Respondent visited the facility in Minnesota.

7. On October 1, 1974, Respondent called Petitioners from Ohio to discuss the investment.

8. On October 3, 1974, Petitioners from Minnesota sent a letter from Haskins & Sells on the tax benefits of the proposed investment. This letter was delivered in Ohio.

9. On October 3, 1974, Petitioners personally responded in writing to Respondent's October 1, 1974,

phone call. This letter was delivered in Ohio.

10. On October 12, 1974, Respondent, who happened to be in West Virginia at the time, called Petitioners and informed them that he had decided to invest.

11. On or about October 12, 1974, Respondent had funds sent to Petitioners from his Ohio broker.

12. On October 17, 1974, Petitioners mailed the subscription agreement to Respondent in Ohio.

13. Respondent, in Ohio, executed the subscription agreement and from Ohio mailed it back to Petitioners in Minnesota on October 21, 1974.

14. Subsequent to the closing on this investment there were further communications by mail among the parties between Minnesota and Ohio.

VI. SUMMARY OF ARGUMENT

The due process clause is not offended by the application of Ohio's Blue Sky Laws to a non-Ohio resident who, though never physically present within the state, purposefully enters into transactions with an Ohio resident pursuant to means and instrumentalities of interstate commerce directed into Ohio. See Travelers Health Ass'n v. Virginia, 339 U.S. 643 (1950); McGee V. International Life Insurance Co., 355 U.S. 220 (1950). It has been established by this Court that an "isolated sale" may be sufficient, consistent with principles of due process, to subject an out of state defendant to in personam jurisdiction. See McGee, supra.

No basis exists for granting certiorari because of a conflict between circuits. As noted by the Court of Appeals:

> Each of these cases must be decided on its own facts. 652 F.2d at 654.

Cases in other circuits cited by the petitioner do not establish a conflict between the circuits since they are factually distinguishable and were decided on the basis of issues not before the Court of Appeals in the case at bar. The "conflict" between the circuits urged by the petitioner is illusory.

No basis exists for granting of certiorari under any of the other grounds this Court normally considers in determining whether to grant certiorari.

VII. REASONS WHY WRIT SHOULD NOT BE GRANTED

The principles of law upon which the Court of Appeals based its decision are well established by this Court and the Circuits.

The Court of Appeals based its decision on this Court's decision in the case of Travelers Health Ass'n v. Virginia, 339 U.S. 643 (1950), upon which both petitioners and respondent relied.

Travelers concerned the constitutionality of the provisions of Virginia's "Blue Sky Law" requiring the licensing of broker dealers and securities salesmen. The act provided for the issuance of cease and desist orders against those selling securities in violation of the Act.

Travelers Health Association was a Nebraska Corporation maintaining offices only within that state. From Nebraska, it conducted its health insurance busi-

by mail-order. No agents were located in Virginia and communications were handled strictly by mail.

The Commonwealth filed proceedings to obtain a cease and desist order. Travelers made a special appearance to object to jurisdiction. It was also contended that Virginia had no power to reach them as to any part of its regulatory law.

Two separate issues were presented to the court. First, whether the defendants could be subject to personal jurisdiction in Virginia courts. Second, whether Virginia could, by legislation, regulate the activities of an out of state firm selling certificates of insurance to Virginia residents by mail. See concurring opinion of Douglas, J., at p. 652-3. The court resolved both issues in the affirmative based upon the facts outlined above. In so ruling the court held:

> [W] here business activities reach out beyond one state and create continuing relationships and obligations with citizens of another state courts need not resort to a fictional "consent" in order to sustain the jurisdiction of regulatory agencies in the latter state.
>
> ***
>
> [a] state has a legitimate interest in all insurance policies protecting its residents against risks, an interest which the state can protect even though the 'state action may have repercussions beyond state lines. ... 'And in Hoopeston Canning Co. v. Cullen 318 U.S. 313, 316, we rejected the contention based on the Benn case among others, that a state's power to regulate must be determined by a 'conceptualistic discussion' of theories of the place of contracting or of performance.'

Id. at 647-8.

Petitioners attempt to make much of the language in Traveler's that the "association did not engage in mere isolated or short-lived transactions." Petitioners then state that "[t]he Supreme Court has not yet decided a

'mere insolated sale' case."

In fact, this Court has decided a "mere isolated sale" case in the context of the sale of insurance. In McGee v. International Life Insurance Co., 355 U.S. 220 (1950), this Court held that mail order solicitation by an out of state company in the context of a single transaction was a sufficient basis for the exercise of in personam jurisdiction. In McGee, a resident of California purchased a life insurance policy from an Arizona Company. A Texas corporation assumed the obligations under the policy and mailed a reinsurance certificate to the policyholder in California. The offer was accepted and premiums were paid by mail from California to Texas. Neither of the insurers maintained any office or agent in California, and neither solicited any business apart from the policy before the Court. Id. at 222.

This Court held that the contract

had a substantial connection with California:

> The contract was delivered in California, the premiums were mailed from there and the insured was a resident of that state when he died.

Id. at 223. This Court held that California could constitutionally acquire in personam jurisdicition over the insurers.

The cases cited by the petitioners in support of their contention that a "conflict" exists among the circuits establishes no such "conflict".

In Gaillard v. Field, 381 F.2d 25 (10th Cir. 1967) the issue was whether or not the California securities laws applied in a case brought in Oklahoma as to transactions involving oil and gas interests. In that case, it was determined that the regulation of oil and gas interests as securities was contrary of the public policy of Oklahoma and the California Blue Sky

Laws were held inapplicable on conflict of law principles.

In Doherty v. Bartlett, 81 F.2d 920 (1st Cir. 1936) the issue was likewise the applicability of a particular state's blue sky law:

> He violated no provision of the New Hampshire law by soliciting a sale in Massachusetts, where he was duly registered and authorized to solicit a sale of securities as a representative of the defendant. Doherty, 81 F.2d at 928.

In the case at bar, the applicability of Ohio's Blue Sky Laws is conceeded. Petitioners Petition at p.13.

Neither case cited by petitioners was decided on the basis of due process

VIII. CONCLUSION

The decision of the Sixth Circuit Court of Appeals, based as it was upon the specific facts of the case, broke no new ground. That Court's decision was solidly based upon well established principals of law decided by this Court. The Court's decision does not in any sense raise any unsettled questions concerning either the due process or commerce clauses. While there is undoubtedly a "conflict" in fact patterns and issues represented by the decisions cited to this Court by Petitioners, the decision of the Sixth Circuit is not clearly at variance with the decision of any other circuit. The fact pattern of the case at bar affords this Court no opportunity to either break new ground or to resolve issues which might have been left unresolved in Travelers, supra, or McGee, supra. It would therefore be

improvident for this Court to issue the writ as prayed for by Petitioners.

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IX. CERTIFICATE OF SERVICE

This is to certify that the undersigned, a member of the Bar of this Court, served three copies of the foregoing Brief of Respondent in Opposition to the Petition for Certiorari upon Alan L. Briggs, Esq., counsel for Petitioners by hand delivery at his office located at 250 East Broad Street, Columbus, Ohio 43215, in accordance with Rule 28.3, and upon William J. Brown, Attorney General of the State of Ohio, by hand delivery at his office located at the State Office Tower, Columbus, Ohio 43215, in accordance with Rule 28.4(c).